(6)

Supreme Court, U.S.
FILED
JUN 9 - 2003
OFFICE OF THE CLERK

No. 02-1215

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:

WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2083

June 9, 2003

JAMES M. COSTAN
Counsel of Record
T. ALANA DEERE
MCGUIREWOODS LLP
1050 Connecticut Ave., N.W.
Suite 1200
Washington, DC 20036
(202) 857-1700

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THIS CASE IS SUITABLE FOR REVIEW.	2
II. THE LIMITED REGULATION OF PIPELINES UNDER § 5(f) OF THE OCSLA IS IRRELEVANT TO THE NEED FOR REVIEW OF THE FERC'S JURISDICTIONAL TEST UNDER THE NGA	4
III. THE FERC'S ORDERS CONFLICT WITH THIS COURT'S INTERPRETATION OF § 1(b) OF THE NGA IN *NORTHERN NATURAL*	5
IV. NO LOWER COURT RULING BARS THE FERC FROM DETERMINING THAT SEA ROBIN'S ENTIRE SYSTEM IS JURISDICTIONAL	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Bankers Trust New York Corp. v. United States, 225 F.3d 1368 (Fed. Cir. 2000) 6

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 6

EP Operating v. FERC, 876 F.2d 46 (5th Cir. 1989) 7-8

ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071 (D.C. Cir. 2002) 2

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 6

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 6

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) 6

Neal v. United States, 516 U.S. 284 (1996) 2, 6

Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963) 1, 5-6

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989) 5

Sea Robin Pipeline Co. v. FERC, 127 F.3d 365 (5th Cir. 1997) 7

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986) 5

STATUTES

Natural Gas Act, 15 USC § 717 *et seq.* ..... *passim*

Section 1(b), 15 U.S.C. § 717b (2003) 2, 5-6

Section 4, 15 U.S.C. § 717c (2003) 1, 3-4

Section 5, 15 U.S.C. § 717d (2003) 1, 3-4

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* 1, 4

Section 5(f), 43 U.S.C. § 1334(f) (2003) 1, 4

Section 5(f)(4), 43 U.S.C. § 1334(f)(4) (2003) 4

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE DECISIONS

	Page
Dauphin Island Gathering System, 93 FERC ¶ 61,198 (2000)	3
Enron Gulf Coast Gathering, L.P., 97 FERC ¶ 61,001 (2001)	3
Natural Gas Pipeline Co. of Amer., 100 FERC ¶ 61,286 (2002)	3
Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated*, *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal pending, The Williams Companies v. FERC*, No. 02-5056 (D.C. Cir., filed Feb. 5, 2002)	4
Sea Robin Pipeline Co., 94 FERC ¶ 61,137 (2001)	3
Sea Robin Pipeline Co., 98 FERC ¶ 61,236 (2002)	2
Transcontinental Gas Pipe Line Corp., 97 FERC ¶ 61,296 (2001)	3-4
Transcontinental Gas Pipe Line Corp., 97 FERC ¶ 61,298 (2001)	3-4
Transcontinental Gas Pipe Line Corp., 97 FERC ¶ 61,300 (2001)	3-4
Trunkline Gas Co., 97 FERC ¶ 61,169 (2001)	3-4

IN THE

Supreme Court of the United States

No. 02-1215

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Respondents' assertions that this case is somehow moot or unripe because of a Sea Robin rate settlement agreement, or unfit for review because comparable rate protection is available to shippers under § 5(f) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1334(f), are groundless. Respondents' settlement claim is contradicted by the terms of the settlement on which the Respondents rely, and the OCSLA contains no provisions comparable to §§ 4 and 5 of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717c, 717d, mandating just and reasonable rates by pipelines on the Outer Continental Shelf ("OCS").

The core of this case is that the Federal Energy Regulatory Commission ("FERC") has disregarded this Court's ruling in *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S.

84, 90 (1963), that "gathering" under § 1(b) of the NGA, 15 U.S.C. § 717b, is "narrowly confined to the physical acts of * * * preparing the gas for the first stages of distribution." It may be, as Respondents emphatically stress, that the FERC's new "central point of aggregation" test examines 13 physical factors, but it remains that the FERC's test produces a regulatory exemption that has nothing to do with "preparing gas for the first stages of distribution" and certainly is not narrowly confined. Under *Neal v. United States*, 516 U.S. 284, 295 (1996), the FERC's rendering of § 1(b) must honor the prior interpretation of this Court.

We address these points further below. We also show that, contrary to Respondents' suggestion, no lower federal court decision precludes the FERC from reaffirming its earlier view, held for some 30 years, that Sea Robin's entire system is jurisdictional.

I. THIS CASE IS SUITABLE FOR REVIEW.

Respondents are incorrect in asserting that this case is moot or unripe for review on the basis of the 2002 rate settlement in *Sea Robin Pipeline Co.*, 98 FERC ¶ 61,263 (2002). (FERC Opp. at 9, 16; Sea Robin Opp. at ¶ 3; Williams Opp. at 3, 7.) Paragraph 4(a) of the settlement approved by the FERC expressly states that "[t]his Settlement shall not affect the review on consolidated proceedings currently before the United States Court of Appeals for the District of Columbia Circuit in *ExxonMobil Gas Marketing Co. v. FERC*,"[1] which is this very case.

That express disclaimer of mootness or unripeness makes perfect sense: the parties well understood that the principle enunciated by the FERC in this case would govern across the OCS and provide the rule of decision in all future cases—as

---

[1] Stipulation and Agreement ¶ 4(a), *Sea Robin Pipeline Co.*, Docket No. CP95-168-006, filed Jan. 16, 2002, approved March 13, 2002.

in fact it has.[2] Thus the *Sea Robin* orders have had and will continue to have a real and immediate impact on the FERC's scheme for regulating OCS pipelines.

Moreover, even though Sea Robin's upstream facilities continue for now to be subject to NGA rate review based on the "in connection with" clause of NGA §§ 4 and 5, Sea Robin is free to transfer those facilities to a non-regulated entity at any time, which would terminate NGA rate coverage.[3] Following such a transfer, the new owner would be free to increase the rates to shippers except as specifically constrained by contract. This is not hypothetical speculation: Respondent Williams notes that the trend among regulated pipelines is to transfer their gathering facilities "to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated independent gatherers." (Williams Opp. at 5.)

---

[2] *See, e.g., Natural Gas Pipeline Co. of Amer.*, 100 FERC ¶ 61,286 (2002); *Transcontinental Gas Pipe Line Corp.* (hereinafter "*Transco*"), 97 FERC ¶ 61,296 at 62,382 (2001); *Transco*, 97 FERC ¶ 61,298 at 62,396 (2001); *Transco*, 97 FERC ¶ 61,300 at 62,409 (2001); *Trunkline Gas Co.* (hereinafter "*Trunkline*"), 97 FERC ¶ 61,169 (2001); *Enron Gulf Coast Gathering, L.P.*, 97 FERC ¶ 61,001 (2001); *Dauphin Island Gathering System*, 93 FERC ¶ 61,198 (2000).

[3] The FERC's orders acknowledge the temporal nature of its ability to regulate Sea Robin's upstream facilities under the "in connection with" clause:

> Here, Sea Robin *still owns* the subject gathering facilities * * * . *As a result*, Sea Robin's gathering rates are within the Commission's rate jurisdiction under the NGA.

Sea Robin Pipeline Co., 94 FERC ¶ 61,137 at 61,525 (2001) (emphasis added).

II. THE LIMITED REGULATION OF PIPELINES UNDER § 5(f) OF THE OCSLA IS IRRELEVANT TO THE NEED FOR REVIEW OF THE FERC'S JURISDICTIONAL TEST UNDER THE NGA.

Respondents are also incorrect in contending that shippers are somehow compensated for the loss of rate protection under the NGA by the enactment in 1978 of the competitive principles enunciated in § 5(f) of the OCSLA. (FERC Opp. at 16-17; Williams Opp. at 3, 8-9.) The Court of Appeals did not adopt that view (Pet. App. 25a), nor should this Court. As the FERC itself has recognized many times, OCSLA § 5(f) does not fix rates but only requires open and nondiscriminatory access to OCS pipelines.[4] The OCSLA contains no provision analogous to §§ 4 and 5 of the NGA, requiring OCS pipelines to charge only "just and reasonable" rates on file with and approved by the Commission.

Indeed, Congress expressly included a savings clause in § 5(f)(4) of the 1978 OCSLA Amendments to make clear that the addition of OCSLA § 5(f) would not "limit, abridge, or modify * * * any other provision of law with respect to pipelines on or across the outer Continental Shelf." 43 U.S.C. § 1334(f)(4). That clause by itself demonstrates that Congress never intended that OCSLA § 5(f) would override or could substitute for NGA §§ 4 and 5.

---

[4] *See, e.g., Transco,* 97 FERC ¶ 61,300 at 62,409; *Transco,* 97 FERC ¶ 61,298 at 62,396; *Transco,* 97 FERC ¶ 61,296 at 62,382; *Trunkline,* 97 FERC ¶ 61,169 at 61,799; *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf,* Order No. 639-A, III FERC Stats. & Regs. ¶ 31,103 at 31,686 (2000), *vacated, Chevron U.S.A., Inc. v. FERC,* 193 F. Supp. 2d 54 (D.D.C. 2002), *appeal pending, The Williams Companies v. FERC,* No. 02-5056 (D.C. Cir., filed Feb. 5, 2002) (recognizing that the OSCLA does not provide for rate regulation equivalent to that of the NGA).

III. THE FERC'S ORDERS CONFLICT WITH THIS COURT'S INTERPRETATION OF § 1(b) OF THE NGA IN *NORTHERN NATURAL*.

The central issue in this case is whether the FERC's orders are consistent with this Court's interpretation of NGA § 1(b) in *Northern Natural* and its progeny[5] that gathering is "narrowly confined to the physical acts of * * * preparing the gas for the first stages of distribution." *Northern Natural*, 372 U.S. at 90. The FERC does not really contest our point (and the point made by dissenting Judge Edwards, Pet App.33a-34a) that the dividing line between gathering and transportation on Sea Robin at the Vermilion Block 149 platform has nothing to do with where gas on Sea Robin is physically prepared for the first stages of distribution. Instead, as if equating numerosity with virtue, the FERC argues that, "based on 13 physical factors, the Vermilion Station divides Sea Robin's non-jurisdictional gathering functions from its jurisdictional transportation functions." (FERC Opp. at 12.) But the number of factors considered is beside the point if the result does not define the end point of gathering in reasonable proximity to the point where the gas is physically prepared for the first stages of distribution. As Judge Edwards noted, *that* point in this case is located at the production platforms just upstream of Sea Robin's facilities, where the gas is separated to remove free water and (if necessary) dehydrated to remove excess water vapor so that it will be acceptable for carriage on Sea Robin's system. (Pet. App. 37a.)

The FERC's 13-factor test might be an appropriate vehicle for determining where regulatory jurisdiction should start and end if Congress had instructed the Commission to design a

---

[5] *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 513-514 (1989); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422-23 (1986).

regulatory scheme from scratch. But the NGA is on the books with its own history of interpretation by this Court. It exempts only gathering lines, and we know from *Northern Natural* both that the exemption must be narrowly confined and that gathering has to do with physical acts of preparing the gas for the first stages of distribution. Because no physical preparation of the gas occurs at the Vermilion Block 149 platform, the FERC's decision in this case is contrary to the statute.

The Court of Appeals suggested (Pet. App. 22a), as does the FERC (Opp. at 14), that this Court's interpretation of the statute no longer holds because the "unbundling" of gas services in the interstate market permits a reinterpretation of § 1(b). But only this Court can declare *Northern Natural* obsolete.[6] *Chevron*[7] deference does not license the FERC to interpret the statute differently from settled law, no matter how many factors the FERC offers in support of its determination. *Neal*, 516 U.S. at 295 ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.").[8]

---

[6] See our petition (Pet. 12-14) for other points in respect to Respondents' "unbundling" argument.

[7] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[8] *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (recognizing that the Court's settled interpretation of a statute trumps *Chevron* deference to an agency's interpretation); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989); *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed. Cir. 2000).

IV. NO LOWER COURT RULING BARS THE FERC FROM DETERMINING THAT SEA ROBIN'S ENTIRE SYSTEM IS JURISDICTIONAL.

The FERC suggests that the Fifth Circuit in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997), foreclosed a determination that all of Sea Robin's facilities remained jurisdictional. (FERC Opp. at 10; Williams Opp. at 14-15.) But the Fifth Circuit remanded the initial *Sea Robin* orders solely because the FERC had relied too heavily on a single physical factor and various non-physical factors in applying its primary function test. *Sea Robin*, 127 F.3d at 370-71. The FERC was free on remand to reach whatever jurisdictional result it determined was appropriate, based on its examination of the relevant characteristics of the Sea Robin system and consistent with the decisions of this Court.

The FERC also tasks us for failing to cite any court decision "accepting [our] view that the function of gathering ceases at the wellhead or production platform operating offshore." (Opp. at 10.) But we do not contend that gathering ceases at the wellhead,[9] and the view that gathering ceases at the production platforms was of course precisely the FERC's view, for almost 30 years, in its exercise of jurisdiction over Sea Robin's entire system.[10]

---

[9] As noted in our petition (Pet. 3-4), there are hundreds of miles of gathering lines upstream of Sea Robin's system that connect wellheads to production platforms and that connect multiple platforms for purposes of collecting gas to a central platform for preparation and treatment (*i.e.*, separation and dehydration) before injection of the treated gas stream into Sea Robin's system for transport to shore. These hundreds of miles of pipeline and associated equipment upstream of Sea Robin are non-jurisdictional gathering facilities.

[10] Contrary to Respondents' contention, the result we advocate is supported by, not in conflict with, the Fifth Circuit's opinion in *EP Operating v. FERC*, 876 F.2d 46 (5th Cir. 1989). (FERC Opp. at 10;

In sum, the decision below is wrong, there are no impediments to its review, and the question presented is of paramount importance to the orderly and successful development of natural gas resources on the Outer Continental Shelf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2083

June 9, 2003

JAMES M. COSTAN
Counsel of Record
T. ALANA DEERE
MCGUIRE WOODS LLP
1050 Connecticut Ave., N.W.
Suite 1200
Washington, DC 20036
(202) 857-1700

Williams Opp. at 15.) That case held that gathering ended at the offshore platform where free water was removed and the gas was dehydrated so that it could be carried to shore on ANR Pipeline's facilities. *EP Operating*, 876 F.2d at 49. Thus the decision supports our view that lines that carry gas and free water are gathering lines, while lines that carry gas to shore after full separation of free water are transportation facilities.